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ASSOCIATION OF AMERICAN RAILROADS

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March 7, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 707, Demurrage Liability

Dear Ms. Brown:

Pursuant to the Board's Notice served December 6, 2010 (as amended January 20, 2011), attached please find the Comments of the Association of American Railroads for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot

Attachment

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 707

DEMURRAGE LIABILITY

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Introduction and Summary of Position

In an Advance Notice of Proposed Rulemaking ("ANPR") served December 6, 2010, the Surface Transportation Board ("STB" or "Board") instituted a proceeding regarding demurrage, *i.e.*, charges for holding rail cars. The Board's stated intent "is to adopt a rule or policy statement addressing when parties should be responsible for demurrage in light of current commercial practices followed by rail carriers, shippers, and receivers." ANPR at 1.

The Board's ANPR arises out of recently-divided case law in the federal courts of appeals on the issue of whether a warehouseman (or other party that is not the beneficial owner of freight being shipped) is subject to liability for demurrage if it is named as consignee in the bill of lading and accepts rail cars, but later claims it did not know of, or did not assent to, consignee status.[1] Specifically, in *Novolog*, the Third Circuit held that a named consignee is subject to liability for demurrage unless it complies with the consignee-agent provisions of 49

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[1] Compare *Norfolk S. Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009) ("*Groves*"), *cert. denied* ___S. Ct. ___ (Jan. 18, 2011) (non-assenting warehouseman named as consignee found not liable for demurrage), with *CSX Transp. Co. v. Novolog Bucks Cnty.*, 502 F.3d 247 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1240 (2008) ("*Novolog*") (transloader named as consignee found liable for demurrage unless, pursuant to 49 U.S.C. § 10743(a), it notifies the carrier in writing in advance of delivery that it is acting only as agent and identifies the principal party liable for demurrage charges). *See* ANPR at 2 n.3.

U.S.C. § 10743(a)(1). In *Groves*, the Eleventh Circuit held that a named consignee was not subject to liability unless it agreed to be named as consignee, or at least had notice that it was being named as consignee. The Board "institut[ed] this proceeding in an effort to update [its] policies regarding responsibility for demurrage liability and to promote uniformity in the area." ANPR at 2. The Board accordingly requested public comment on several legal and factual matters to assist the Board in resolving the "third-party car receiver" demurrage liability issue through a rulemaking or policy decision.

The Association of American Railroads ("AAR"), on behalf of its member railroads, submits these comments in response to the Board's December 6, 2010 ANPR. The AAR agrees with the Board that demurrage is "an important tool in ensuring the smooth functioning of the rail system" (ANPR at 1) and believes it essential that nationwide uniformity and certainty be restored to the rules for determining demurrage liability. The AAR, however, believes that the recent split in the federal courts of appeals regarding the "third-party" demurrage liability issue (*i.e.*, the *Groves/Novolog* split) can be addressed by the Board within the framework of existing law.

As discussed by the AAR in its comments, the *Novolog* and *Groves* court actually agreed on most of the fundamental principles that govern the application of the demurrage system to the named consignee in a bill of lading. The AAR believes that the Board should not disturb those principles. As the AAR discusses below, to the extent that the *Novolog* and *Groves* courts parted ways in applying those principles, the *Novolog* court's analysis more accurately reflected the governing statute, as well as the policy objectives and practical aspects of demurrage. Accordingly, the AAR urges that the Board endorse the *Novolog* analysis as appropriately

allocating liability to the named consignee under the circumstances described in the *Novolog* and *Groves* cases.

At the same time, the AAR believes that the Board could help restore some degree of uniformity to the treatment of third-party intermediaries in courts bound by the *Groves* decision by addressing what "notice" should be sufficient to provide a third-party intermediary with "notice that it is being named as a consignee in order that it might object or act accordingly." *Groves*, 586 F.3d at 1282. Specifically, the Board should explain that, in light of the nature of relationships between and among shippers, receivers and railroads, the statutory obligations of railroads, and the policies advanced by demurrage, a named consignee should be subject to liability for demurrage if it had the opportunity to learn of its status "in order that it might object or act accordingly." *Id.*

In short, the Board should endorse the Third Circuit's ruling in *Novolog* that a named consignee is subject to liability for demurrage despite claims that it never assented to, or lacked knowledge of, its status. The Board should also make clear, for courts bound by *Groves,* that a named consignee should be subject to liability for demurrage as long as the named consignee has an opportunity to learn of its status, either from the railroad, the shipper or some other source, so it can invoke the consignee-agent provisions of 49 U.S.C. § 10743(a).

In its comments, the AAR also addresses various other issues raised by the Board in the ANPR.[2]

Discussion

I. As the Board Recognized in the ANPR, the Demurrage System Plays an Important Role in the Efficient Functioning of the National Rail System and It Is Essential That There Be National Uniformity and Clarity in the Law Governing Demurrage Liability

[2] The AAR notes that individual carriers are also filing separate comments in response to the ANPR .

A. Demurrage Plays an Essential Role in Ensuring the Efficiency and Smooth Functioning of the National Rail System

The U.S. freight rail system extends over approximately 140,000 miles of track owned and operated by privately-owned freight rail carriers. Although there are over 500 U.S. rail freight carriers with various ownership or leased rights in individual lines of railroad track,[3] the U.S. rail system is highly integrated and operates as a network.

The effective capacity and efficiency of the network depends not only on its size, but also on the availability and efficient movement of freight cars over that network. Because it is not economically feasible or practical for rail carriers to own all the railcars that would be necessary to adequately serve the shipping community at peak or high demand periods, the network's railcar fleet consists of railcars owned by freight carriers, private car leasing companies and the shipping community.[4] These cars are routinely interchanged over the rail network and their prompt availability to carriers and shippers when needed must be assured.[5]

As Congress recognized from the early days of railroad regulation (and as was recognized at common law), the ability of a carrier to impose demurrage charges on a shipper or consignee for undue delay in loading or unloading freight cars is essential for the efficient movement of freight over the rail network. *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262 (1926); *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co.*, 253 U.S. 319, 323 (1920). Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are unduly detained by shippers or

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[3] ASSOCIATION OF AMERICAN RAILROADS, *Railroad Facts* 3 (2010 ed.).

[4] As of 2008, there were approximately 1.4 million freight cars in service. *Railroad Facts* at 51.

[5] Car shortages are normal occurrences in times of peak or unexpected demand (or national emergencies) and vary in duration and severity. Demurrage rules requiring prompt return of railcars is essential to meet carrier and shipper needs and prevent system-wide backups on the rail network. See *Car Demurrage Rules, Nationwide*, 350 I.C.C. 777, 787 (1975); *Alleghany-Ludlum Steel Corp.*, 406 U.S. 742, 745 (1972).

consignees for loading and unloading freight and serves as a penalty for undue car detention (to encourage the speedy return of rail cars to the rail network). *See* ANPR at 1; *see also Chrysler Corp. v. New York C. R. Co.*, 234 I.C.C. 755, 759 (1939); *Union Pacific Railroad Co. v. Ametek, Inc.*, 104 F.3d 558, 559 n.2 (3d Cir. 1997).

Because of its importance in facilitating an adequate car supply and promoting the efficient movement of railcars through the Nation's rail network, demurrage has long been subject to regulation by the Surface Transportation Board (and its predecessor agency, the Interstate Commerce Commission ("ICC")). *See* ANPR at 2; *see also Turner, Dennis & Lowry Lumber Co., supra*; *Pennsylvania R.R. Co. v. Kittaning Iron & Steel Mfg. Co., supra.* Under the ICCTA, carriers impose demurrage charges on shippers or consignees for undue delay in loading or unloading railcars to ensure that cars are not unduly detained or improperly used as storage facilities.[6] As required by 49 U.S.C. §10746, carriers "shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property."[7]

Moreover, the existence of an effectively functioning demurrage system is of more importance now than ever. The existing national rail system is currently at or near capacity on several line segments and the rail industry must spend billions of dollars over the coming decades to expand network capacity to meet the growing needs of domestic and international rail

[6] Demurrage is normally assessed on the "consignor" (the shipper of the goods) for delays at origin and on the "consignee" (the receiver of the goods) for delays at destination. *See* ANPR at 3.

[7] Demurrage charges and terms are imposed pursuant to carrier tariff and are subject to the requirement, if challenged, that they be "reasonable" as determined by the STB. 49 U.S.C. §10702. Demurrage charges are generally assessed and retained by the railroad on whose line the cars are detained. *See South Carolina Rys. Com. v. Seaboard Coast L.R.*, 365 I.C.C. 274, 277 (1981).

commerce.[8] Because an essential element in meeting the growing capacity needs of the rail shipping community is the more efficient use of railcars on the network, it is vital to the industry that its ability to impose and enforce demurrage charges for the undue detention of railcars throughout the national system not be impaired. Further, a transportation disruption resulting from undue detention of railcars anywhere on the national system is not merely localized but has the potential to create serious back-ups throughout the system.

B. It is Essential to the Effective Operation of the Demurrage System That There Exist National Uniformity and Clarity in the Law Governing Demurrage Liability and That Such Rules Effectively Serve to Implement the Policy Objectives of 49 U.S.C. § 10746

In order for the demurrage system to effectively function over the national network a carrier cannot be left guessing as to whether the delivery instructions provided to it by the consignor on the bill of lading correctly state the *de facto* status of the consignee responsible for demurrage at destination, or whether the named consignee after accepting the goods without objection as the intended recipient will later claim to be acting only as an agent for another party and refuse to pay demurrage charges for failure to return freight cars promptly. A carrier must also not be put in a position of uncertainty as to which party it must turn to ensure the prompt return of freight cars to its system and as responsible for demurrage liability.

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[8] *See, e.g., National Rail Freight Infrastructure Capacity and Investment Study (Cambridge Systematics)* (September 2007) (results of study indicating that approximately $148 billion must be invested over the next 30 years to increase rail freight capacity); see also *Supplemental Report to the U.S. Surface Transportation Board on Capacity and Infrastructure Investment (Christensen Associates, Inc.)* (released April 8, 2009) (available on STB website at http:www.stb.dot.gov.); *Freight Railroads, Industry Health Has Improved, But Concerns About Competition and Capacity Should Be Addressed* (October 2006) (GAO -07-94); *see also* Weatherford, Brian A, Henry Wills, and David S. Ortiz, "The State of US Railroads: A Review of Capacity and Performance Data," RAND Supply Chain Policy Center, 2008 ("RAND Study") at 3 (noting that over the past 25 years traffic density on the nation's rail network has "nearly tripled"). The Board has also instituted various proceedings and commissioned studies to examine the capacity needs of the railroad industry. *See, e.g.*, STB Ex Parte No. 671, *Rail Capacity and Infrastructure Requirements* (Notice of Public Hearing) (served March 6, 2007); STB Ex Parte No. 680 (Sub-No. 1) *Supplemental Report on Capacity and Infrastructure Investment* (served April 8, 2009).

The Board thus has a clear regulatory responsibility in this proceeding to do what it can to establish rules governing demurrage liability of third party intermediaries that are uniform and consistent with the policy objectives underlying the demurrage system, and the Board should exercise its responsibility as promptly as possible after evaluating the comments submitted in response to the ANPR.[9]

II. The Board Should Find That the *Novolog* Approach Is the Correct Application of Long-Standing Law Respecting Liability of Named Consignees, Most Effectively Furthers the Policy Objectives of the Demurrage Provisions, Produces the Most Practical and Fairest Outcome to the Third Party Intermediary Demurrage Liability Issue and Is Wholly Consistent with Current Commercial Practices; Conversely, the *Groves* Approach, Which Adds an Additional Issue of Consignee "Assent" to the Demurrage Liability Analysis, Fails to Implement the Policy Objectives Underlying the Demurrage System, Is Unworkable in Practice and Creates Serious Uncertainty in the Law

A. Prior to the *Groves* decision, the general rules governing allocation of liability to intermediaries named as consignees for demurrage charges, including the applicability of the consignee-agent provisions of 49 U.S.C. 10743(a)(1), were effectively uniform, clear and provided certainty to carriers and the shipping community. Both *Novolog* and *Groves* recognized the applicability of these general rules and statutory provisions in the course of their decisions and differed only with respect to the extra-statutory consignee "assent" requirement imposed by the *Groves* court.

The *Novolog* and *Groves* courts agreed on the fundamental principles governing demurrage liability for intermediaries named as consignees in a bill of lading, except for the existence of a requirement of consignee "notice" or "assent." Both *Novolog* and *Groves* agreed that the bill of lading is "the basic transportation contract between the shipper-consignor and the carrier" and that its terms and conditions "bind the shipper and all connecting carriers." *S. Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342 (1982); *Novolog*, 502 F.3d at 263; *Groves*, 586 F.3d at 1276 n.1. The bill of lading, *inter alia*, instructs the carrier where to transport the goods and provides the carrier with the names of the shipper and the consignee. See

[9] As noted supra, the U.S. Supreme Court denied petitions for *certiorari* in both *Novolog* and *Groves*.

Bills of Lading 9 I.C.C. 2d 1137, 1143-44 (1993) ("*Bills of Lading*"); *see also Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 18-19 (2004) ("*Kirby*").

Both *Novolog* and *Groves* concurred that the term "consignee", in normal meaning and normal use throughout the rail industry, is "[o]ne to whom goods are consigned." *Black's Law Dictionary* 327 (8th ed. 2004).[10] *Novolog*, 502 F.3d at 257; *Groves*, 586 F.3d at 1276 n.3. Both *Novolog* and *Groves* also agreed that the carrier has a legal obligation to transport the shipment to the consignee named in the bill of lading. *Novolog*, 502 F.3d at 259; *Groves*, 586 F.3d at 1276 n.1, 1281.

Both *Novolog* and *Groves* also agreed that under governing law "[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom." *See Novolog* 502 F.3d at 254-55; *Groves*, 586 F.3d at 1277-1278; *see also Evans Prods. Co. v. Interstate Commerce Comm'n* , 729 F.2d 1107, 1113 (7th Cir. 1984) (citations omitted) (accord); *S. Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154, 156 (N.D. Cal. 1974) ("The obligation to pay demurrage arises either out of contract, statute or prevailing custom"); *Middle Atl. Conference v. United States*, 353 F. Supp. 109, 1118 (D.D.C. 1972) (3-judge court) ("*Middle Atlantic*") (liability for demurrage "must be founded either on contract, statute or prevailing custom").

Novolog and *Groves* also agreed that the law was clear that a consignee named in the bill of lading becomes a party to the transportation contract, and is bound by it, when it accepts the freight; no separate contractual agreement is required.[11] *Novolog*, 502 F.3d at 254-55; *Groves*,

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[10] *Groves* also specifically noted that both the Federal Bills of Lading Act (49 U.S.C. §80101 (1)) ("'consignee' means the person named in a bill of lading as the person to whom the goods are to be delivered'") and the carrier's demurrage tariff at issue defined "consignee" consistent with the accepted definition. See *Groves*, 1276, n.3.

[11] *Novolog* , 502 F.3d at 254-255 (citing, *inter alia*, *Louisville & Nashville Ry. Co. v. Central Iron & Coal Co.*, 265 U.S. 59, 70 (1924) ("if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of delivery, or not until later"); *see also Pittsburgh v*

586 F.3d at 1278-79. Both courts also agreed that a consignee named in a bill of lading that is responsible for undue delay in unloading goods and returning rail cars to the national rail system is liable for demurrage charges set forth in a carrier's demurrage tariff. *Novolog*, 502 F.3d at 259; *Groves*, 586 F.3d at 1276 (["A carrier] is required by the ICCTA (49 U.S. C. § 10746) and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination").

The *Novolog* and *Groves* courts, moreover, both agreed that the consignee-agent provisions of 49 U.S.C. § 10743(a)(1) essentially embodied in statutory terms the common law of agency pursuant to which a party timely disclosing its agency status on behalf of a named principal may avoid liability for obligations of the principal; that such provisions were applicable to demurrage liability; and that such provisions, if timely and appropriately invoked, provided an exception to the consignee's demurrage liability. *Novolog*, 502 F.3d at 255; *Groves*, 586 F.3d at 1279.[12] As summarized in *Groves* (at 1279):

"Thus far our analysis has surveyed the undisputed aspects of demurrage liability. The parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges, that a consignee becomes a party to the transportation contract upon accepting the

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Fink, 250 U.S. 577, 581 (1919) ("The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier.").

[12] *See Groves*, 586 F.3d at 1273 ("There are exceptions to a consignee's demurrage liability. A consignee may avoid demurrage liability by notifying the carrier of its agency status prior to accepting delivery of the shipment... The ICCTA recognizes the common law rule of agency [quoting the language of 49 U.S.C. 10743 (a) (1)]... Thus, an agent-consignee can avoid demurrage liability by notifying the carrier of its agency status and providing the carrier with the name and address of the shipment's beneficial owner prior to accepting delivery"; *see also Novolog*, 502 F.3d at 255 ("Historically the principle governing the liability of parties named as consignees in the bill of lading was a simple one of notice. In general 'a consignee as such under a straight bill of lading [was] liable [because] treated as presumptive owner and compelled to pay.' *In re Tidewater Coal Exch.*, 292 F. 225, 234 (S.D.N.Y.1923) (Hand, J.). However, if the consignee was 'known [by the carrier] not to be the owner' but a mere 'factor' or agent, the consignee was not liable for demurrage. *Id.* The carrier might have notice of the relationship because the bill of lading included language such as 'care of' or 'account of,' or might simply know of the agency through long dealing even if the bill of lading failed to disclose it. *Id.* at 233-34. In either case, the principal rather than the agent would be liable. *Id.* These common law principles are reflected in ICCTA's consignee-agent liability provision [quoting the language of 49 U.S.C. 10743 (a) (1)]."

freight consigned to it, and that a consignee may avoid demurrage liability by disclosing its agency status prior to accepting delivery of the shipment ...."

B. The *Groves* decision, by imposing an "assent" or "notice" requirement on the meaning of the term "consignee" as used in the bill of lading and by failing to properly apply the requirements of 49 U.S.C. § 10743(a)(1), upset the uniformity of the law imposing presumptive liability for demurrage charges on a consignee named in the bill of lading that accepts delivery, created a rule that fails to implement the policy objectives of the demurrage provisions, and is impractical and confusing in application. The *Novolog* rule, by contrast, is a correct application of existing law, serves the policy objectives of the demurrage provisions, and is clear, practical and fair in application.

1. The *Novolog* Approach to the Consignee "Assent" or "Notice" Issue Is Correct and Effectively Serves the Policy Objectives Underlying the Demurrage Provisions

A central issue upon which the *Groves* and *Novolog* courts reached different conclusions was in applying the consignee-agent provisions of 49 U.S.C. § 10743(a)(1) in the context of a named consignee's claim that it was not liable for demurrage because it never "assented" to being named consignee on the bill of lading. The AAR submits that *Novolog* correctly implemented the provisions of 49 U.S.C. § 10743(a)(1) in the context of such a claim consistent with the statutory language and the underlying policy objectives of the demurrage provisions, and that the *Groves* approach not only confused and upset the national uniformity of the law governing demurrage liability, but imposed an impractical obstacle to the efficient operation of the demurrage system that the Board should address.

The *Novolog* court addressed the named consignee's claim that it never "assented" to its status and was therefore not liable for demurrage through a straightforward application of the consignee-agent provisions of 49 U.S.C. § 10743(a)(1), which the court found "appears designed to address precisely the ...situation where a carrier assesses charges after delivery against the named consignee and recipient of the freight, but the consignee/recipient contests its liability for the charges on the grounds that it is a mere middleman." *Novolog*, 502 F.3d at 256.

The *Novolog* court found that the specific requirements of the consignee-agent liability provisions of the ICCTA (49 U.S.C. § 10743(a)(1)) controlled and that the "requirements were not burdensome: the consignee agent is obligated merely to notify the carrier, in writing, of the agency relationship" in advance of accepting the goods. *Id.* at 255-56. The *Novolog* court also found that "to hold that the documented designation of an entity as a consignee and that entity's acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability." *Id.* at 257. The *Novolog* court also rejected the contention that it would be inequitable to treat the named consignee as presumptively liable:

> "Finally, although Novolog suggests that it would be inequitable to allow a carrier's or shipper's unilateral choice of designation to make it party to the transportation contract, no unfairness results from applying the statute's plain language. Under the statutory scheme, the named consignee can avoid liability in two ways: first, by refusing the freight (which Novolog concedes it could have done); and second, by providing the carrier timely written notice of agency under Section 10743(a)(1), if appropriate. The rail carrier, in contrast, has no option but to deliver the freight to the consignee named by the shipper, whether that be the ultimate consignee or owner or a middleman such as a transloader or warehouseman. As *amici* railroads argue, such middlemen generally have no incentive to enter into separate contracts with carriers that would make them responsible for demurrage charges; if they cannot easily be held accountable for their own delays, they may simply decide to use the rail cars as free storage. Holding such entities presumptively responsible for delays occurring while the railcars are under their control under the clear rule of Section 10743 ensures that the railroads will be able to assess demurrage, while also making it possible for all parties (carriers, middlemen such as Novolog, shippers, and ultimate consignees) to allocate the risk of liability by private contract, if they so choose."

Novolog, 502 F.3d at 259.

In contrast to *Novolog*, the *Groves* court applied a contract law analysis to redefine the meaning of the term "consignee" as used in the bill of lading and applicable carrier tariff (*i.e.*, "the party designated to receive a shipment of goods"). The *Groves* court required a "meeting of the minds" before a party named as consignee on the bill of lading who accepts goods delivered

by the carrier can be held to have consented to demurrage liability through becoming party to the transportation contract. As found in *Groves*:

> "Although a consignee's liability may rest upon quasi-contract, a party's status as consignee is a matter of contract and must be established as such." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa.Cmwlth. 595, 496 A.2d 422, 424 (1985). Like any contractual relationship, there must be a meeting of the minds between the parties. This Circuit has previously recognized that 'it is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract.'"

Groves, 586 F.3d at 1281.

As held in *Groves*: "[A] party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly." *Id.* at 1282. The *Groves* court also construed the advance written notice requirement of 49 U.S.C. § 10743(a)(1) as applicable only to agents who are also consignees, but not to agents who are not "consignees" under the court's redefinition of the term "consignee." *Id.* at 1281.[13]

The AAR submits that the *Groves* court incorrectly required that a railroad prove the consignee named in the bill of lading assented to, or had notice of, its consignee status before the carrier could apply its demurrage rules to the named consignee. Under the long-established case law and the provisions of 49 U.S.C. § 10743, as properly held in *Novolog*, a rail carrier is entitled to rely on the information provided in the bill of lading, and it is the *consignee* named on the bill of lading ("the party to whom the goods are consigned") that must notify the carrier of the consignee's alleged agency relationship prior to the consignee's acceptance of the goods, in

[13] The AAR recognizes that there exists language in *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003) (*"South Tec"*) (and a small number of district court decisions) that the *Groves* court cited in support of its "assent" approach. See *Groves* at 1280, 1282. Until *Groves*, however, there was no actual split in the federal courts of appeals on the third party intermediary liability issue and no serious challenge to the demurrage system as long interpreted by the courts and the STB/ICC. *Groves* itself noted that its "research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case." *Groves*, 586 F.3d at 1278 n.4.

order for the alleged consignee-agent to avoid demurrage charges imposed under the carrier's tariff.[14] The carrier is in no position, and under no common-law or statutory obligation, to question or ascertain whether the named consignee in a bill of lading actually "consented" to be named as consignee before delivering the goods, and can only rely on the named consignee's acceptance of the goods without objection as proof of its consignee status. Unless notified otherwise, the carrier should be entitled to presume that the named consignee on the bill of lading is in fact the consignee and to hold that party responsible for paying any demurrage charges that accrue. [15]

Indeed, this presumption is vital to make demurrage work efficiently and effectively. The carrier itself plays no legal role in determining the agency status of the named consignee and it cannot be held responsible for second-guessing the designation on the bill of lading. *See Kirby,* supra; *Great Northern,* supra; *Regal-Beloit,* supra. As instructed by the bill of lading and as required under the terms of the carrier's demurrage tariff, the carrier has a legal obligation under the ICCTA both to deliver the goods to the named consignee and to impose demurrage charges on the named consignee pursuant to the tariff's terms.[16] The *Groves* decision thus leaves

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[14] *See Middle Atlantic,* 353 F. Supp. at 1120-21 ("The law is well settled that an agent for a disclosed principal is not liable to a third person for acts within the scope of agency."); *R. Franklin Unger, Trustee of the Ind. Hi-Rail Corp., Debtor-Petition for Declaratory Order-Assessment and Collection of Demurrage of Switching Charges,* STB Docket No. 42030, 2000 STB Lexis 333, n.13 ("demurrage and detention charges ... do not apply to agents acting for the principal parties to the transportation [if] the agency relationship [is] disclosed"). As noted supra, the *Groves* court expressly recognized in its decision that this common law rule of agency is reflected in the provisions of 49 U.S.C. § 10743(a)(1). *See Groves,* 586 F.3d. at 1273.

[15] *Cf. Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 33 (2004) ("*Kirby*")[quoting from *Great Northern R. Co. v. O'Conner,* 232 U.S. 508, 514-15 (1914) ("*Great Northern*")] (railroad "had the right to assume that the Transfer Company [intermediary] could agree to the [tariff] terms of the shipment"; the "[carrier] could not be expected to know if the transfer company had any outstanding, conflicting obligation to [the shipper/owner] ...."; *see also Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.,* 130 S. Ct. 2433, 2442 (2010) ("*Regal-Beloit*") ("As in *Kirby,* the terms of the bill [of lading] govern the parties' rights").

[16] The *Groves* decision expressly recognizes these carrier obligations ("Norfolk is required by the ICCTA and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination"). *Groves,* 586 F.3d. at 1276.

carriers in a state of uncertainty as to their ability to impose demurrage charges under circumstances over which they have no control.

As found by the *Novolog* court, the burden imposed on an alleged consignee-agent by the advance written notice requirement of 49 U.S.C. § 10743(a)(1) is minimal. The consignee would be aware of its agent status, and it need only inform the railroad of its status prior to accepting the goods. Moreover, the receiver of the goods to be delivered by the carrier must itself be held to have a minimum affirmative duty to ascertain (and correct if necessary) its status on the bill of lading with the consignor prior to delivery. If the demurrage provisions of the ICCTA are to be effectively served, there should be no incentive for a designated receiver of goods to place itself in a position of willful ignorance as to its status under the bill of lading so that it can later claim after delivery of the goods—and extended retention of the railcars—that it is not liable for demurrage because it never explicitly consented to be named as consignee and liable for demurrage. [17]

In short, the *Groves* decision not only creates uncertainty about the ability of rail carriers to apply demurrage charges on a uniform basis throughout the national rail system, it provides no incentive for named consignees such as warehousemen/transloaders (or indeed any other consignees who can claim that they never "consented" to be named as consignees in the bill of lading) to comply with their obligation to promptly unload and return rail cars to the national system. Unlike the *Novolog* approach, the *Groves* decision seriously undermines the effectiveness of demurrage charges in promoting the efficiency of the Nation's rail network, and

[17] Shippers and receivers should communicate to ensure that shippers correctly reflect receivers' *de facto* status in the bill of lading. Receivers could insist that shippers provide copies of bills of lading. In addition, or alternatively, shippers and receivers could negotiate arrangements to address situations in which bill of lading information is incorrect. In any event, as discussed in the comments filed in this proceeding by several AAR members, receivers generally have ample opportunity to determine whether they are named as consignees in the bill of lading so that they can, if necessary, provide the advance written notice required by section 10743(a)(1).

the Board should reject it in favor of the *Novolog* analysis which serves all the objectives of the demurrage provisions and correctly implements existing law governing demurrage liability with respect to intermediaries named as consignees.

2. The Board's Analyses of the *Novolog* and *Groves* Decisions in the ANPR Correctly Recognize the Serious Deficiencies of the *Groves* Approach in Furthering the Policy Objectives of the Demurrage System and That the *Novolog* Approach Serves Those Policy Objectives; the Board's Analysis Should Further Recognize That the *Novolog* Approach is Also Fully Consistent with Current Commercial Practices and Applicable Law

In its analysis in the ANPR, the Board expressly recognized the deficiencies of the *Groves* approach in furthering the policy objectives of the demurrage provisions:

> "*Groves* ... is unsatisfying in various ways. First, it overlooks the fact that, because the warehouseman is in the best position to deal with returning the equipment or rejecting cars if its facility is overcrowded, finding the warehouseman to be responsible for demurrage would best advance the intent of 49 U.S.C § 10746 (efficient use of freight cars). Moreover, although we share the concern that a party might be made liable for charges without its knowledge, as the decision in *Novolog* points out, it is also true that the warehouseman is the one who has the relationship with the shipper, and it should not be the carrier's responsibility to investigate whether the relationship described in the bill of lading accurately reflects the *de facto* status of the parties."

ANPR at 5.

The Board's analysis of the *Novolog* approach, in contrast, correctly recognized that *Novolog* is based on valid transportation reasons and properly places demurrage liability on the party responsible for efficient handling of the rail cars. The Board's discussion of the potential deficiencies of the *Novolog* approach was essentially predicated on the Board's concern that the decision may have failed to take into account current commercial practices such as use of electronic bills of lading:

> "*Novolog* ... cites valid transportation reasons for putting liability on the best party to release the rail cars (the warehouseman) or to decline the cars if it knows that its facility is already overcrowded. Yet *Novolog* places dispositive weight on the designation given to the warehouseman in the bill of lading, which historically was a paper document that was consciously agreed upon by the carrier and the

> shipper *(although it did not require any action by the consignee)*. Today, however, transactional paperwork such as the bill of lading is largely handled electronically, and the role of the railroad, the shipper, and the listed consignee in making the designation is evolving."

ANPR at 5 (emphasis added).

The AAR submits that the fact that the bill of lading "historically was a paper document" and that "transactional paperwork such as the bill of lading is largely handled electronically" under current commercial practices, provides no basis for the Board to take issue with the *Novolog* court for "plac[ing] dispositive weight" in establishing liability of an intermediary receiver on its designation as consignee "in the bill of lading."

First, the bill of lading is uniformly recognized in both judicial and agency case law as "the basic transportation contract between the shipper-consignor and the carrier" and that its terms and conditions "bind the shipper and all connecting carriers." *See* supra, at 7.[18] Neither the *Novolog* court nor the *Groves* court denied the legal importance of the bill of lading as a dispositive document in providing delivery instructions to the carrier and designating the consignee to whom the carrier had a legal duty to deliver the goods. See, e.g., *Novolog*, 502 F.3d at 259; *Groves*, 586 F.3d at 1276 n.1, 1281 (carrier required to deliver goods entrusted to it by shipper/consignor to consignee named in bill of lading).

Second, the fact that the bill of lading is now created electronically rather than as a paper document has no bearing on the issue of the named consignee's obligations. The shipping

[18] As described by the ICC, "A bill of lading serves three distinct functions. It is a receipt for goods, a contract for carriage and a document of title. Essentially, the ... rail bill of lading is designed to provide the carrier with essential shipping information: shipper, consignee, origin, destination, commodity and volume...." *Bills of Lading*, 9 I.C.C. 2d 1137, 1143-44 (1993) ("*Bills of Lading*"); *see also Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 18-19 (2004) ("*Kirby*") (A bill of lading "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage"). Moreover, a carrier is required under 49 U.S.C. § 11706 to issue bills of lading and "the terms of the bill govern the parties' rights." *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2442 (2010).

instructions provided to the carrier in the electronic bill of lading, just as previously when the bill of lading was in paper form, are based on information provided by the *shipper/consignor* to the carrier and are as understandable to the shipper/consignor and carrier as to the named consignee (or "care of" party) to whom the carrier is instructed to deliver the goods as they were in the past. Essentially, the same necessary shipping and billing information as provided previously by the shipper/consignor in paper form to the carrier is now provided in electronic data interchange ("EDI") form. The Board itself specifically approved the use by shippers and carriers of electronic bills of lading and recognized that the electronic version of the bill of lading was intended to serve the same purpose in providing essential shipping instructions to the carrier as the paper version. *See Bills of Lading*, 9 I.C.C. 2d 1137 (1993); *Bills of Lading*, Ex Parte No. 495, 1993 WL 230055 (I.C.C. June 8, 1993).[19]

Moreover, as the Board specifically recognized, historically the consignee itself was not directly involved in the preparation of the paper bill of lading. ANPR at 5. Despite the Board's conjecture in the ANPR (at 5) that the "the role of the railroad, the shipper, and the listed consignee in making the [consignee] designation is evolving" under current commercial practice, the situation in fact remains unchanged. The consignee is still not directly involved in the preparation of the bill of lading and the carrier still must rely on the shipper/consignor's designation in the bill of lading as to the named consignee in the course of following the shipper/consignor's delivery instructions. It is also still the consignee's responsibility under the

[19] The Board further implies that the paper bill of lading was "consciously agreed to" by the consignor and carrier, while the electronic bill of lading may represent a lesser status of agreement between the parties. The bill of lading information in both the paper and electronic versions, however, both contain specific shipping instructions provided by the shipper/consignor to the carrier as to the receiver (the party physically receiving the goods). Moreover, the *de facto* status of the receiver in both forms of the bill of lading (as "consignee" or "care of" party) is designated by the shipper/consignor not the carrier. The carrier plays no role in structuring the commercial relationship between the shipper and designated consignee and has never been in a position to ascertain whether the designated consignee has consented to its status as such at the time the bill of lading instructions (whether in paper or electronic form) are provided to it.

consignee-agent provisions of ICCTA to advise the carrier as to its *de facto* agency status prior to delivery of the goods. See *Novolog*, 502 F.3d at 255; *Groves*, 586 F.3d at 1279.[20]

Thus, there is no material change resulting from the switch in commercial practice from use of paper bills of lading to electronic bills of lading that would warrant a court to place less reliance on the consignee designation in the bill of lading as previously or that would warrant a departure from long-settled law on this issue.

In the ANPR the Board also raised the prospect that regulatory changes over the years such as elimination of the tariff filing requirement suggested the need for the Board to revisit its policies on the demurrage liability issue. ANPR at 2. The AAR submits that elimination of the tariff filing requirement has no bearing on the "third party intermediary" demurrage liability issue addressed in *Groves* and *Novolog*. First, even if the tariff filing rule were still in effect, a published tariff would only advise interested parties of a carrier's general rates, terms and conditions governing demurrage liability; the tariff itself would not serve to notify a specific party to a specific shipment that it has been named as consignee on the bill of lading governing that shipment. Second, although rail carriers are no longer required to file tariffs with the Board, the carriers still publish demurrage tariffs providing information regarding the carrier's rates, terms and conditions governing demurrage liability and make them available to the shipping public on their websites. *See Novolog*, 502 F.3d at 251 n.1.

The AAR is unaware of any other regulatory changes that would impact upon the current demurrage system that would require the Board to call into question the appropriate responsibility of intermediaries named as consignees in the bill of lading. If anything, the

[20] Indeed, the provisions of the back of the bill of lading (which have not been deprescribed by the ICC (or the Board) and which remain identical to that in the paper bill of lading) specifically incorporate the consignee-agent provisions of 49 U.S.C. § 10743(a)(1). *See Bills of Lading*, supra.

importance of preserving the effectiveness of the demurrage system is even more important in the current environment of constrained capacity.

III. 49 U.S.C. § 10743 (a)(1) Was Properly Construed By Both *Novolog* and *Groves* As Applying to Demurrage

In the ANPR, the Board also questioned the correctness of the finding by the ICC in *Eastern Central*[21] that the provisions of 49 U.S.C. § 10743(a)(1) applied to demurrage.[22] The Board noted that "the language of § 10743 ("[l]iability of rates for transportation") can be read to focus on the shipping charges themselves, and not on accessorial charges such as demurrage." ANPR at 6. The Board also noted that (citing to *Blanchette v. Hub City Terminals, Inc.*, 683 F. 2d 1008 (7th Cir. 1981) *("Hub City")* and *Union Pac. R.R. v. Hall Lumber Sales, Inc.*, 419 F. 2d 1009 (7th Cir. 1969) *("Hall")*), the legislative history of § 10743(a)(1) indicated that it was "intended to address the liability of a sales agent for freight charges that turned out to be higher than those originally paid" [1927 amendment to former 49 U.S.C. 3(2)] or "to address the liability of an agent vis a vis a beneficial owner for additional freight charges resulting when

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[21] *Responsibility for Payment of Detention Charges, Eastern Cent. States*, 335 I.C.C. 537, 541 (1969) *(Eastern Central)*, aff'd *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1114-15 (D.D.C. 1972) (3-judge court) (*"Middle Atlantic"*).

[22] In the ANPR, the Board also questions whether there would arise an inconsistency between the provisions of 49 U.S.C. § 10743(a) and 49 U.S.C. § 10743(b) if subsection (a) were construed to include demurrage charges. ANPR at 6. The Board's implication is that because subsection (b) does not apply to pre-paid shipments, "applying § 10743 to demurrage as well as line-haul charges could have the curious effect of making the consignee liable for demurrage if the shipment is not pre-paid, but not liable...if it is prepaid." *Id.*

The AAR submits that the provisions of subsection (b) are irrelevant to the issue before the Board. First, the subsection at issue here is the consignee-agent provisions of subsection (a) which have been consistently construed to include demurrage. Secondly, subsection (b) (which was adopted by the 1940 amendment enacting former 49 U.S.C. 3(3)) specifically deals with the circumstance where a *consignor also names itself as consignee* and then reconsigns the freight en route to a party mistakenly identified as " *beneficial owner*" (emphasis added). While it also provides an advance notice procedure by which a party mistakenly named as beneficial owner may avoid liability for transportation charges, the entire subsection by its own language simply "does not apply to a prepaid shipment of property." 49 U.S.C. § 10743(b). Thus, where the shipment is prepaid, the general rules of demurrage liability would still apply *vis a vis* the named consignee in the bill of lading and there would be no inconsistency between the two subsections on the demurrage liability issue. Neither *Groves* nor *Novolog* considered subsection (b) relevant to their demurrage liability analysis.

shipments were reconsigned and refused at destination" [1940 amendment adding former 49 U.S.C. 3(3)] and that "neither event speaks to application of the provision to demurrage." ANPR at 6.

The AAR submits that the consignee-agent provisions of 49 U.S.C. § 10743(a)(1) have long been construed by agency and court decisions as applying to demurrage (and would also include other accessorial charges).

First, the "rates for transportation" language cited by the Board in the ANPR reflects the language used in the recodified predecessor of current § 10743 (former 49 U.S.C § 10744 (1982)). The original consignee-agent provisions in the Interstate Commerce Act prior to codification (as set forth in former section 49 U.S.C. § 3(2) and former section 49 U.S.C. § 323) used the term "transportation charges" in lieu of "rates for transportation." Both terms are equivalent in meaning.[23] As noted in *Novolog*:

> "There is no substantive difference between the terms "transportation charges" and "rates for transportation" in the statute. *See* Historical and Revision Notes to 49 U.S.C. § 10744 (1982) ("[t]he word 'rates' is substituted for 'charges' for consistency in view of the definition of 'rate' in section 10102 of the revised title")."

Novolog, 502 F.3d at 256, n.8; *see also id.* at 256 (finding that "[t]here can be little question that railcars—as cars, vehicles, instrumentalities, or equipment related to the movement of property by rail—are encompassed by [the definition of "transportation" under 49 U.S.C § 10102(9)]" and that demurrage charges would clearly be included within the definition of "rates for transportation" under the provisions of 49 U.S.C. §§ 10102(7) and (9)).

Moreover, the term "transportation charges" as used in the predecessor sections to 10743(a)(1) has long been construed by the agency and the courts as embracing demurrage. As

[23] The "transportation charges" language of 49 U.S.C § 323 (1964) (applicable to motor carriers) was in fact the language construed by the ICC in *Eastern Central*. *See also Novolog*, 502 F.3d at 256.

explained by the ICC in *Eastern Central*, "[w]hile detention charges have a purpose different from that of freight charges...*demurrage charges are part of the total transportation charges.*" *Eastern Central*, 335 I.C.C. at 539-40 (emphasis added). Indeed, demurrage has been referred to by the agency and courts as "extended freight" and has been uniformly considered as embraced in "transportation charges" or "rates for transportation". See *S. Pac. Transp. Co. v. Matson Navigation Co.*, 383 F. Supp. 154, 156 (N.D. Cal. 1974) (demurrage is "extended freight"); accord *Pennsylvania Railroad Co. v. Moore-McCormack Lines, Inc.*, 370 F. 430, 432 (2d Cir. 1966); *Southern Railway System v. Leyden Shipping Corp.*, 290 F. Supp. 742, 744 (S.D.N.Y. 1968); *see also Groves*, 586 F.3d at 1275 ("demurrage is considered part of the transportation charge"); see also *Hub City*, 683 F.2d at 1011 (implicitly construing the predecessor provisions to current § 10743 as applying to both "line transportation and trailer detention charges").

As further explained in *Novolog*, simply because the legislative history of the consignee-agent provisions of § 10743 indicates that the primary purpose for which the provisions were enacted was to provide a clear statutory means by which a party acting as sales agent may avoid liability for undercharges does mean that that is the limit of the provision. "Although this is clearly one of the purposes of the provision, it by no means excludes its applicability to other kinds of charges that can arise after delivery." *Novolog*, 502 F.3d at 256, n. 9. Moreover the statutory language used in § 10743 broadly applies to all "charges for transportation" or "rates for transportation" and is not limited to "shipping charges" as the ANPR posits as a possible construction of the provision. ANPR at 6.

Indeed, it is instructive as to the scope of the provision that in its review of the legislative history, *Hall* specifically noted that one of the problems the 1927 amendment to former 49

U.S.C. §3(2) was specifically intended to address was the outcome in *New York Cent. & H.R.R. Co. v. York & Whitney Co.*, 256 U.S. 406 (1921) ("*York & Whitney*"):

> "Under prior case law [*York & Whitney*], the ultimate consignee was compelled to pay the carrier any difference between the full amount of the tariff charges required by law and those actually paid, even though the consignee was only a sales agent whose sale price, commission and remittance to its principal were based on the charges paid at the time of delivery. The debates are specific that the purpose of the amendment was to alter this rule in favor of ultimate consignees who gave notice of their agency."

Hall, 419 F. 2d at 1012, 1012 n. 9. The charges at issue in *York & Whitney* were in fact not just "freight charges" but charges "for freight *and refrigeration.*" *See York & Whitney* at 407. "Refrigeration" (i.e., "icing and salting") is an *accessorial charge. See Armour & Co. v. U. S.*, 169 F. Supp. 521, 521 (Ct. Cl. Jan. 14, 1959) ("*accessorial services furnished by the carrier [include]... the icing and salting of refrigerator cars....*") (emphasis added); *Chas. Abbate Co. v. Jarecki,* 172 F. Supp. 497, 497 (N.D. Ill. 1959) (noting that accessorial charges include "services set forth under the labels 'General Refrigeration,' 'Ice and Salt,'" in the applicable freight bills); *see also* 49 U.S.C. § 10102(9)(B) (including in the definition of "transportation" "services related to [a] movement [of passengers or property], including...transfer in transit, *refrigeration, icing*....") (emphasis added).

Further, as noted in both *Novolog* and *Groves*, the provisions of 49 U.S.C. 10743(a)(1) essentially reflect and embody in statutory language common law agency principles as long applied in the context of demurrage liability of an agent acting on behalf of a named principal. As explained in *Novolog*:

> "Historically the principle governing the liability of parties named as consignees in the bill of lading was a simple one of notice. In general "a consignee as such under a straight bill of lading [was] liable [because] treated as presumptive owner and compelled to pay." *In re Tidewater Coal Exch.*, 292 F. 225, 234 (S.D.N.Y.1923) (Hand, J.). However, if the consignee was "known [by the carrier] not to be the owner" but a mere "factor" or agent, the consignee was not

> liable for demurrage. *Id.* The carrier might have notice of the relationship because the bill of lading included language such as "care of" or "account of," or might simply know of the agency through long dealing even if the bill of lading failed to disclose it. *Id.* at 233-34. In either case, the principal rather than the agent would be liable. *Id.* These common law principles are reflected in ICCTA's consignee-agent liability provision [49 USC 10743(a)(1)]
>
> "Building on the common law, it adopts the principle that the named consignee becomes a party to the transportation contract upon receipt of the freight and is thereafter liable for all relevant charges, whether immediately due or arising after delivery, unless the consignee is an agent and the carrier has notice of this. It adds precision to the common law tradition, however, by clearly laying out what a named consignee/recipient must do to avoid liability on the grounds that it is an agent. The requirements are not burdensome: the consignee is obligated merely to notify the carrier, in writing, of the agency relationship."

Novolog, 502 F.3d at 255-56; *see also Groves*, 586 F.3d at 1279 ("The ICCTA [in 49 U.S.C. 10743(a)(1)] recognizes the common law rule of agency....Thus, an agent-consignee can avoid demurrage liability by notifying the carrier of its agency status and providing the carrier with the name and address of the shipment's beneficial owner prior to accepting delivery."); *accord Middle Atlantic*, 353 F. Supp. at 1121.

IV. The Board Can Help Restore Uniformity In Demurrage Cases By Making Clear That The Consignee Named In A Bill Of Lading Has Sufficient Notice Of Its Status If A Railroad Provides Access To That Information Before The Property Is Delivered.

Although the AAR urges that the Board recognize and adopt the *Novolog* analysis in this proceeding as the correct one, it also has an interest in assuring that courts bound by the *Groves* decision apply that decision in a manner that is most consistent with a uniform nationwide approach to demurrage. The AAR believes that the key to achieving this outcome is an appropriate application of the *Groves* court's recognition that a third-party intermediary that is named as a consignee in the bill of lading is appropriately subject to liability for demurrage as long as it was "given notice that it is being named as consignee in order that it might object or act accordingly." *Groves*, 586 F.3d at 1282. Specifically, the AAR believes that the Board should

make clear its view that the "notice" requirement should be satisfied as long as a railroad, the shipper, or some other party has provided the receiver with an opportunity to ascertain its status "before delivery of the property." 49 U.S.C. § 10743(a)(1). Although courts will ultimately interpret and apply *Groves*, they can be expected to look to the Board's industry expertise for guidance.

The AAR believes that the laws, practices, and policies that apply to demurrage support a conclusion that receiver has "notice" of its consignee status in a bill of lading sufficient to subject it to liability for demurrage as long as a shipper, railroad, or other party provides an opportunity for the receiver to invoke the protections of section 10743(a)(1).

First, as even the *Groves* court recognized, "assent" to be named as a consignee is not necessary to subject the receiver to liability for demurrage. Notice is sufficient, even under *Groves*, because a receiver with appropriate notice can avoid liability by invoking section 10743(a)(1).

Second, receivers should be encouraged to determine their status in the bill of lading. Placing some of the responsibility on receivers is reasonable because receivers can avoid demurrage liability by invoking section 10743(a)(1). In addition, as between receivers and railroads, the receivers are in a far better position to ensure that shippers provide accurate information in the bill of lading. Railroads are not a party to the commercial arrangements between shippers and receivers – they must rely on the information provided in the bill of lading to determine whether the receiver is also the consignee.

Third, railroads should be able to establish liability for demurrage through actions within their own control, and without being required to prove the actions of shippers or receivers. As the Board has recognized, "demurrage is an important tool in ensuring the smooth functioning of

the rail system." ANPR at 1. Demurrage cannot fulfill its important functions if railroads are prevented from collecting appropriate charges by an inability to prove that receivers actually assented to, or actually obtained notice of, their potential liability for demurrage. Demurrage also cannot fulfill its important functions if receivers have an incentive not to obtain actual knowledge of their status under the bill of lading.

The AAR does not believe that the Board should establish specific requirements or minimum standards that a railroad would have to meet to demonstrate that a receiver had a sufficient opportunity to ascertain its status as the named consignee in the bill of lading. As discussed above, the opportunity could be provided through the actions of the shipper or some other party, as well as a railroad. However, the AAR urges the Board to take note of current industry practice in this respect (as described in the comments of several AAR members) and recognize that railroads can meet the *Groves* case's notice requirements in different ways. The AAR also urges the Board to conclude that it is appropriate to require that receivers exercise their opportunities to determine their status in bills of lading because they have an opportunity to avoid liability under section 10743(a)(1), they have commercial relationships with the shippers that provide bill of lading information to railroads, and they are the ones with the ability and incentives to ensure that cars are not unduly detained at their destination.

V. AAR Responses to Specific Issues for Which the Board Sought Comment in the ANPR

Board Issue # 1

- "Describe the circumstances under which intermediaries ought to be found liable for demurrage in light of the dual purposes of demurrage. Notwithstanding the ICC's decision in Eastern Central, is there a reason why we should not presume that a party that accepts freight cars ought to be the one that is liable regardless of its designation on the bill of lading, so long as it has notice of its liability before it accepts cars?"

AAR Response:

The AAR believes that intermediaries ought to be found liable for demurrage at least where they are the named consignee in a bill of lading. The AAR is not encouraging the Board to attempt to create new or different liability rules in this proceeding, but the AAR believes it would be appropriate for the Board to make clear the general policies that support holding receivers liable for demurrage charges.

See also the separate Comments of Norfolk Southern Railway Company.

Board Issue # 2:

- Explain how the paperwork attending a shipment of property by rail is processed and how it gives (or does not give) all affected parties (rail carriers, shippers, consignee-owners, warehousemen etc.) notice of the status they are assigned in the bill of lading. For purposes of assessing demurrage, should it be a requirement that electronic bills of lading accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction? If so, and if electronic bills of lading do not accurately reflect the *de facto* status of each party in relation to other parties involved with the transaction, please suggest changes that will ensure that they do.

AAR Response:

Several AAR members are filing comments that address the Board's request to discuss the paperwork attending a shipment of property by rail. The AAR believes that the *Novolog* case correctly reflects the principle that railroads should be able to rely on a presumption that bills of lading correctly reflect the *de facto* status of each party in relation to the other parties involved with the transaction. Because shippers, not railroads, are responsible for the information in the bill of lading and because receivers have contractual relationships with shippers, consistent application of the *Novolog* approach should provide shippers and receivers with sufficient

incentive to ensure that bills of lading contain accurate information regarding the *de facto* status of each party.

Board Issue # 3:

- With the repeal of the requirement that carriers file publicly available tariffs, how can a warehouseman or similar non-owner receiver best be made aware of its status *vis a vis* demurrage liability? Does actual placement of a freight car on the track of the shipper or receiver constitute adequate notification to a shipper, consignee or agent that a demurrage liability is being incurred? What about constructive placement (placement at an alternative point when the designated placement point is not available)?

AAR Response:

As discussed in the AAR's comments (supra at 18), the repeal of the requirement that carriers file publicly available tariffs is irrelevant to the "third party intermediary" demurrage liability issue. Several AAR members are filing comments that address the Board's more specific questions regarding notification by way of actual or constructive placement of cars.

Board Issue # 4:

- Describe how agency principles ought to apply to demurrage. Are warehousemen generally agents or non-agents, or are their circumstances too varied to permit generalizations? How can a rail carrier know whether a warehouseman or similar non-owner receiver of freight is acting as an agent or in some other capacity?

AAR Response:

As discussed in the AAR's comments (supra, at 22-23), general agency principles applicable to demurrage provide that where a third-party intermediary such as warehousemen or transloader is actually *known* by the carrier to be acting specifically as an agent for a named principal (*e.g.*, where the intermediary is named as a "care of" party on the bill of lading or provides specific notice to the carrier prior to delivery of the goods as to its agent status pursuant

to the consignee-agent provisions of 49 U.S.C. § 10743(a)(1)), the bill of lading does not provide a contractual basis for holding them responsible for demurrage.[24] Conversely, where a party named as consignee in the bill of lading is *not known* by the carrier to be acting in an agent capacity and such party accepts the goods from the carrier without objection and fails to comply with the consignee-agent notification provisions of 49 U.S.C. § 10743(a)(1) prior to delivery of the goods, the consignee- agent *is* liable for demurrage.[25] The AAR does not take issue with the current demurrage scheme incorporating and applying agency principles as reflected in the statutory provisions of 49 U.S.C. § 10743(a)(1)).

With respect to the Board's inquiry as to the general agent or non-agent status of warehousemen (or other third party intermediaries), the status of such parties is dependent on the specific terms and conditions of any agency agreement between them and the shipper-consignor (or other principal party) for whom they perform services for hire. As such, whether an agency relationship exists is predicated on specific contractual arrangements and is not subject to generalization.

"Agency" is defined under the *Restatement Third, Agency* § 1.01 (ALI 2006) ("*Restatement*") (at 17) as follows:

> "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to the act."

As the *Restatement* further notes, "[o]rdinarily, the scope of an agency relationship is defined solely by the parties to the relationship." *See Restatement* at 1.01, comment h at 35.

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[24] Accord, *Restatement Third, Agency* § 6.01 ("Agent for Disclosed Principal") (agent not party to the contract unless it agrees to be party to the contract).

[25] Accord, *Restatement Third, Agency* § 6.03. ("Agent for Undisclosed Principal") (both agent and principal are party to the contract). See also *Restatement Third, Agency* § 6.02. ("Agent for Unidentified Principal") (principal is party to the contract and agent is also party to the contract (unless agent and third party agree otherwise)).

In the specific context of parties performing commercial intermediary functions for hire, the *Restatement* notes that "it is ... common usage to refer without distinction to parties who serve any intermediary function as agents." *See Restatement* at 1.01, comment b at 18. The *Restatement* goes on to warn, however, that "[n]ot all such situations... meet the legal definition of an agency relationship" and that "*the legal consequences of agency may attach to only a portion of the relationship between two persons*, a fact that dictates care in using the term 'agency relationship'." *Id* (emphasis added). The *Restatement* further notes that "some termed independent contractors are agents while others are *non-agent service providers*." *Restatement* at 1.01, comment b at 20 (emphasis added).

Because the terms and scope of any agency relationship (*e.g.*, between the shipper/consignor and warehouseman/transloader) are ordinarily established and defined by the contractual agreement between the parties, and because a party can be acting as an agent for one contractually-defined purpose and as a non-agent service provider for other purposes—or indeed as a non-agent service provider for *all* purposes-- it is not possible for a carrier to determine the existence (or extent) of a warehouseman/transloader's agency relationship simply from the fact that a shipment of goods is destined to a warehouseman/transloader for storage or other purposes.[26] As frankly noted in the comments submitted in this proceeding by Savannah Re-Load (a warehouseman/transloader), "warehousemen are often not agents for their customers. Several of Savannah Re-Load's customers have, through contract, expressly disclaimed any agency relationship."[27]

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[26] As generally noted in *Kirby*, an "intermediary is certainly not automatically empowered to be the cargo owner's agent in every sense. That would be unsustainable." *Kirby*, 543 U.S. at 33.

[27] January 24, 2011 Comments of Savannah-Re-Load at 3. Savannah Re-Load was in fact the warehouseman/transloader party involved in *Groves*.

Indeed, depending on the specific contractual terms relating to (*inter alia*) the shipper/consignor's right to exercise "effective control" over the services provided by the warehouseman/transloader at destination,[28] the warehouseman/transloader as named consignee can be acting as a non-agent for all purposes. *See* Comments of Savannah Re-Load, supra. It can also be acting as an "agent" for a limited purpose (i.e., following forwarding instructions from the principal regarding the goods received), *while acting as a non-agent (and responsible for demurrage*) for the purpose of handling the railcars received at destination and returning the cars to the carrier within the demurrage period. *Cf. South Tec* at 818 (noting that warehouse receiver is "most directly responsible for unloading the cars in a timely manner").

Moreover, it is clear that under the existing demurrage rules a warehouseman or other third party intermediary—*regardless whether acting in some agency capacity or not for an undisclosed principal* —can properly be made liable for demurrage at destination based on contractual agreement or other consent by the named consignee to assume liability for demurrage. See *Groves*, 586 F.3d at 1278 ("freight handler such as [warehouseman] is free to contractually assume liability for demurrage charges" or otherwise consent to be named consignee on bill of lading); *accord Middle Atlantic*, at 1111-1112; *South Tec* at 820.

As is clear from the above discussion, the rail carrier itself would generally have no knowledge of the specific scope of the agency relationship (if any) between the shipper/consignor (or other principal) and the consignee named in the bill of lading at the time it accepts the goods for delivery and would have to rely on the bill of lading information provided by the shipper/consignor (or advance notice such as that prescribed under the provisions of 49

[28] The "traditional indicia of agency [are] a fiduciary relationship and effective control by the principal." *Kirby*, 543 U.S. at 34 (quoting from *Restatement (Second) of Agency*, Sec. 1 (1957).

U.S.C. § 10743(a)(1)) to determine the party liable for demurrage at destination. Accordingly, no generalizations as to the agency status of third-party intermediaries such as warehousemen/transloaders for purposes of determining demurrage liability can be made.

Board Issue # 5

- Given the discussions in Hub City and Hall, should § 10743 be read as applicable to demurrage charges at all? The ICC said it was in Eastern Central, but it did so with little discussion. Would general agency principles apply to demurrage liability even if § 10743 were found inapplicable?

AAR Response:

The AAR believes that the provisions of 49 U.S.C. § 10743 are applicable to demurrage. See AAR Comments, supra at 19-23.

The case law also recognizes that the provisions of 49 U.S.C § 10743(a)(1) reflect long-standing general agency principles that would be otherwise applicable in allocation of demurrage liability in the consignee-agent context. *See Groves*, 586 F.3d at 1279 (and cases cited); *Novolog*, 502 F.3d at 255-56 (and cases cited).

The AAR would emphasize, however, that the provisions of 49 U.S.C. § 10743(a)(1) not only incorporate agency principles, but also "add[] precision to the common law tradition" by: (1) ensuring that such principles are applied in a uniform manner across the national rail system and (2) providing a clear statutory notice procedure through which a party named as consignee on the bill of lading may provide a carrier advance notice of its agency status and avoid demurrage liability. See *Novolog*, 502 F.3d at 255-56.

Board Issue # 6

- If § 10743 is applicable, would the Groves analysis (finding that liability does not attach unless the receiver agrees to accept liability) apply to the underlying shipping rate as well as demurrage charges? If it did, how would such a ruling affect industry practice?

AAR Response:

As discussed supra, the AAR believes that the *Groves* analysis is inconsistent with long-standing law, fails to implement the policy objectives of the demurrage provisions, and is unworkable in application. Accordingly, it should not be adopted by the Board for any purpose.

The *Novolog* rule, by contrast, is consistent with current industry practice regarding allocation of responsibility for collect freight charges. Under standard industry practice, a consignee named on the bill of lading who accepts a shipment of goods from a carrier is normally responsible for collect freight charges. The named consignee may avoid liability for collect freight charges by refusing to accept the goods or by providing notice to the carrier prior to delivery of its agency status and the name of the party responsible for collect freight charges consistent with the advance notice requirement codified in the consignee-agent provisions of 49 U.S.C. § 10743.

The AAR also notes that some of its members have filed comments addressing these issues.

Board Issue # 7

- Because the warehouseman or other receiver can reap financial gain by taking on as many cars as possible (and sometimes holding them too long), or by serving as a storage facility when the ultimate receiver is not ready to accept a car, should liability be based on an unjust enrichment theory? The court rejected such an approach in Middle Atlantic,

353 F. Supp. at 1124, principally because it found no benefit to the warehouseman from holding rail cars. Is that finding valid?

AAR Response:

The AAR believes that the Board is indeed correct that a warehouseman or other receiver can reap financial gain by, *inter alia*, taking on as many cars as possible and holding them too long or by using the cars as a storage facility when the ultimate receiver is not ready to accept a car. Under such circumstances, the warehouseman or other receiver has clearly benefited from use of the rail cars for its own purposes while depriving the carrier of the use of the rail cars to provide transportation services to other shippers; the carrier should accordingly be allowed to recoup appropriate charges from the receiver for the use (and failure to promptly return) the cars to the carrier under an unjust enrichment theory.[29]

The AAR further submits that the court's decision in *Middle Atlantic* [353 F. Supp. at 1124], rejecting the "unjust enrichment" approach under the circumstances of that case is not a bar to the Board applying the unjust enrichment theory of recovery in an appropriate factual setting.

In *Middle Atlantic*, the issue before the court was whether a carrier can lawfully assess demurrage charges against a warehouseman, pier operator or other intermediary not a party to the transportation contract (*i.e.*, a non-owning party not named as consignor or consignee on the bill of lading) through a tariff provision unilaterally including such parties in the definition of "consignor" or "consignee." The court held that the tariffs were improper unilateral attempts by

[29] As described in *In re Light Cigarettes Mktg. Sales Practices Litig.*, 1-09-MD-2068, 2010 WL 2977324 (D. Me. July 26, 2010) (internal quotations omitted):
"[t]he doctrine of unjust enrichment ... applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another, the courts impos[e] a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong."

carriers to legislate changes to the long-standing common-law rules governing demurrage liability of non-parties to the transportation contract and were unlawful. *Middle Atlantic*, 353 F. Supp. at 1122.

The *Middle Atlantic* court also rejected the carriers' efforts to hold warehousemen and other non-parties to the transportation contract liable for demurrage under a "quasi-contract" or "unjust enrichment" theory because the benefits to the warehousemen were not clearly demonstrated before the court in that proceeding:

> "Quasi contracts are created by law for reasons of justice to prevent unjust enrichment of a party, regardless of the expressed intentions of the parties. *While quasi contracts have been created in a variety of situations where one party has clearly bestowed a benefit upon another, we decline to create such a contract here where the unjust enrichment of the warehouseman or other agent is so uncertain. We have not been referred to, nor has our own research disclosed, any cases which have held that the benefits which a warehouseman or agent might receive when he detains a carrier's equipment are such that the warehouseman should be required to compensate the carriers by way of demurrage."*

Id. at 1125. The court also specifically noted elsewhere in its decision that the "unjust enrichment" argument before it was not based on a specific set of factual circumstances, but was instead asserted as a general legal basis for imposing demurrage charges against warehousemen (or other non-parties to the transportation contract) under *any and all* circumstances where the carrier had a demurrage claim:

> "What the carriers here attempt is not to collect demurrage on claims arising *ex delicto* out of the wrongful conduct of warehousemen but instead to establish throughout a large part of the nation a regular system of demurrage charges that will make warehousemen liable for such charges as a more or less normal incidence of their everyday commercial transactions."

Id., at 1118.

The AAR submits that the *Middle Atlantic* decision does not bar the Board from re-examining the issue and allowing carriers to impose demurrage charges on warehousemen and other third party intermediaries not named as consignors or consignees on the bill of lading under an "unjust enrichment" theory where: (1) the third party intermediary is shown by the carrier under the specific factual circumstances at issue to have *itself* been unjustly enriched at the carrier's expense for improper delay in unloading or loading rail cars and returning the rail cars to the carrier within the demurrage period[30] and (2) the carrier is unable to recover the applicable demurrage charges from otherwise responsible parties to the transportation contract (e.g., for reasons of bankruptcy, refusal to pay or other inability of the carrier to collect outstanding demurrage charges).[31]

The AAR would stress, moreover, that the essential purpose of the demurrage system is in fact to foster the efficient movement of railcars throughout the national rail system (*i.e.*, the prompt return of cars is the most important aspect of demurrage liability from the railroads' perspective). Accordingly, sanction by the Board of an "unjust enrichment" theory of liability would serve to better ensure that any existing loopholes in the demurrage system are filled to the maximum extent possible and that all parties responsible for handling rail cars (including third-party intermediaries) have full incentive to efficiently unload and load railcars and return them to the national system as promptly as possible.

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[30] Recovery by the carrier of demurrage charges under an "unjust enrichment" theory of liability would be clearly warranted where the warehouseman or other intermediary reaps a financial benefit at the carrier's expense by: (1) taking on as many cars as possible and holding them too long because of its limited ability to timely unload the cars and return them to the carrier; (2) using the cars as a storage facility when the ultimate receiver is not ready to accept a car; or (3) using the cars as a general storage facility for the purpose of expanding its warehouse storage capacity.

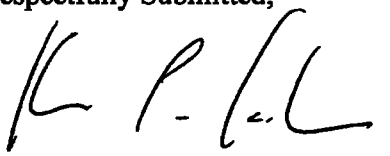
[31] Moreover, there are no legal bars in the ICCTA itself that would prevent the Board from applying the unjust enrichment theory of recovery in an appropriate case. Former legal obstacles previously noted in the case law as grounds for rejecting a "'quasi-contractual"/"unjust enrichment" approach (i.e., the "filed rate doctrine" and its progeny precluding contractual rate agreements) no longer exist. See, e.g., STB Docket No. 42086, *Capitol Materials Incorporated—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Railway Company* (served April 12, 2004), slip op at 6.

The AAR also notes that some of its members have filed comments addressing these issues.

CONCLUSION

The Board should endorse the Third Circuit's ruling in *Novolog* that the consignee named in the bill of lading is subject to liability for demurrage regardless of any claim that it did not know of, or assent to, being named as consignee. The Board should also explain to courts bound by *Groves* that a named consignee should be considered to have appropriate notice of its status as long as it had an opportunity to learn of its status from the shipper, the railroad, or another party, and invoke section 10743(a)(1).

Respectfully Submitted,



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